First Amendment scrutiny when it affirmed the rule in 1975. Instead, relying on two cases from the early days of broadcasting,[180] the Court concluded that the broadcast spectrum remained sufficiently scarce to justify a less rigorous First Amendment analysis: "The physical limitations of the broadcast spectrum are well known . . . . In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential."[181] Because the *NCCB* Court viewed broadcast spectrum as "scarce," it concluded that there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[182] It therefore upheld the Commission's decision to adopt the newspaper/broadcast cross-ownership ban in the hope that it would enhance diversity without considering whether the regulation was narrowly tailored or otherwise sufficient to withstand traditional First Amendment scrutiny.[183]

Whatever the legitimacy of the spectrum scarcity rationale in 1943, or even in 1975, there can be no question that subsequent technological advances, the proliferation of new media outlets, and revisions to the Commission's approach in licensing broadcast spectrum have rendered it obsolete. Today, broadcasters are entitled to the same level of constitutional protection that all other media enjoy.

By 1984, the Supreme Court already had begun to question the continuing validity of the scarcity doctrine:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC,

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[180] *NBC v. United States*, 319 U.S. 190 (1943), and *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

[181] *NCCB*, 436 U.S. at 799.

[182] *Id.*

[183] *Id.*

> charge that with the advent of cable and satellite television, . . . the scarcity doctrine is obsolete . . . .[184]

Although the Supreme Court declined to overturn *Red Lion* in the *League of Women Voters* case, it invited "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[185] Since the time of that decision, the Commission, lower courts, and Congress have clearly signaled the demise of spectrum scarcity as a basis for the permissive regulation of broadcast speech.

First, in 1987, the Commission reviewed its scarcity doctrine in response to a D.C. Circuit remand and squarely concluded that "[t]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press."[186] More recently, Chairman Powell and former Commissioner Furchtgott-Roth bluntly noted that "[t]he long and short of it is this: as matters now stand, the Commission has unequivocally repudiated spectrum scarcity as a factual matter."[187]

Second, numerous lower courts and distinguished jurists also have questioned the continuing validity of the spectrum scarcity rationale. Shortly after the Supreme Court invited review of the scarcity doctrine, the U.S. Court of Appeals for the District of Columbia Circuit in a decision written by Judge Bork said flatly that "[t]here is nothing uniquely scarce about the broadcast spectrum."[188] In 1995, Judge Edwards observed that "today . . . the nation enjoys a

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[184] *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

[185] *Id.*

[186] *Syracuse Peace Council, Memorandum Opinion and Order*, 2 FCC Rcd 5043, 5053 (1987).

[187] *Personal Attack and Political Editorial Rules*, 13 FCC Rcd 21901 (1998) (Joint Statement of Commissioners Powell and Furchtgott-Roth).

[188] *Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 n.4 (D.C. Cir. 1986) ("*TRAC*").

proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum."[189] Accordingly, he concluded that:

> In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast [licensees] based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale.[190]

Only three years ago, the Court of Appeals for the District of Columbia Circuit pronounced that if the FCC were faced with a rulemaking petition, the agency would be "arbitrary and capricious if it refused to reconsider [the newspaper/broadcast cross-ownership rule] in light of persuasive evidence that the scarcity rationale is no longer tenable."[191] Not surprisingly, academics strongly support the views of these distinguished jurists.[192]

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[189] *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) ("*ACT*") (Edwards, J., dissenting). *Accord Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc) ("Partly the criticism [of Red Lion] rests on the growing number of available broadcast channels."); *ACT*, 58 F.3d at 684 (Wald, J., dissenting) ("Technical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years.").

[190] *Id.*

[191] *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998). Since the issuance of the *Tribune* decision, NAA has twice petitioned for the initiation of a rulemaking proceeding. Newspaper Association of America, *Petition for Rulemaking in the Matter of Amendment of Section 73.3555 of the Commission's Rules to Eliminate Restrictions on Newspaper/Broadcast Station Cross-Ownership* (filed Apr. 27, 1997); Emergency Petition for Relief.

[192] Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television . . . . was supplanting conventional, single-channel broadcasting - and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Laurence H. Winer, *Public Interest Obligations and First Principles*, at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment,* at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet

Finally, Congress also has undermined the foundations of the scarcity doctrine by dramatically curtailing the Commission's oversight role in allocating new spectrum. If spectrum scarcity ever was a valid rationale for restricting broadcasters' First Amendment rights, that rationale was only appropriate when the Commission was engaged in conducting comparative hearings to choose among competing broadcasting applicants. As the Supreme Court observed in *Red Lion*, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to *allocate*, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[193] More recently, the Supreme Court has cited the "scarcity of available frequencies at its *inception*" as support for "regulation of the broadcast media that are not applicable to other speakers. . . ."[194]

Thus, in *NCCB*, the Supreme Court rested these conclusions on an inherent need for the FCC to choose among competing applicants for the same channel and the consequent idea that ["Government allocation and regulation of broadcast frequencies are essential."] Because the Commission "was forced to choose among applicants for the same facilities," the Court concluded that the Commission was entitled to exercise the power to restrict ownership in ways the agency deemed likely to advance the public interest.[195]

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resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, *CATO Policy Analysis*, No. 282 at 1, 13, 14 (Sept. 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech.").

[193] 395 U.S. at 388 (emphasis added).

[194] *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2343 (1997) (emphasis added) (citations omitted).

[195] *NCCB*, 436 U.S. at 802.

Today, however, the Commission no longer is engaged, in any meaningful sense, in the business of *choosing* among applicants for broadcast construction permits. Pursuant to the Balanced Budget Act of 1997, available spectrum now must be assigned initially through competitive bidding or auction procedures, rather than comparative proceedings requiring the Commission to evaluate the qualifications and comparative merits of prospective initial permittees.[196]

Now that Congress has adopted a price mechanism as the tool for awarding licenses for the use of broadcast spectrum, the Commission has no basis for continued regulation based on spectrum scarcity. Because broadcast television and radio licenses are, for all practical purposes, traded on the open market, there is nothing unique about broadcast spectrum that distinguishes it from other economic goods.[197] If spectrum is scarce, it is scarce only in the sense that all economic goods are scarce.[198] As a result, economic scarcity, standing alone, cannot provide a

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[196] In the Balanced Budget Act of 1997, Congress expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, 47 U.S.C. Sec. 309(j), by requiring the use of auctions to select among mutually exclusive applicants for commercial broadcast station licenses. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997).

[197] Pursuant to 47 U.S.C. § 310(d), the Commission still reviews the basic licensee qualifications of proposed owners of broadcast facilities before allowing the consummation of license transfers and assignments, but this review, designed to ensure compliance with other broadcast policies such as the prohibition on alien ownership and on acquisitions by individuals with records of certain adjudicated civil or criminal violations, does not arise from concerns over spectrum scarcity.

[198] As the Court of Appeals for the District of Columbia Circuit observed in 1986:

> It is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resources. But the way this is usually done in the American economic system

legitimate constitutional basis for regulating speech. Not everyone can afford to publish a newspaper or magazine, or to make a feature film, yet these forms of expression enjoy full First Amendment protection. The Supreme Court "has never suggested that the dependence of a communication on the expenditure of money operates itself to reduce the exacting scrutiny required by the First Amendment."[199]

The Commission therefore cannot continue to apply a lower level of First Amendment scrutiny to broadcasters based on the concept of "spectrum scarcity." Instead, broadcasters must be afforded the same constitutional protection enjoyed by all other users of spectrum, including their cable and DBS competitors. In a world in which broadcast channels occupy only a few of the dozens of channels of video programming available to the average consumer, regulation based on spectrum scarcity simply no longer makes sense. As Chairman Powell has observed, it "is just fantastic to maintain that the First Amendment changes as you click through the channels on your television set."[200]

B. The Newspaper/Broadcast Cross-Ownership Ban Cannot Survive Either Strict or Intermediate First Amendment Scrutiny.

It is well-settled that broadcasters engage in activity protected by the First Amendment of the United States Constitution.[201] Broadcasters, no less than cable operators, "seek to

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> is to employ the price mechanism, and this allocates resources to users without the need for governmental regulation.

TRAC, 801 F.2d at 508 n.3 (citing Ronald H. Coase, The Federal Communications Commission, 2 J.L. & Econ, 1, 14 (1959)).

[199] *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

[200] Commissioner Michael K. Powell, *The Public Interest Standard: A New Regulator's Search for Enlightenment*, Address Before the American Bar Association 17th Annual Legal Forum on Communications Law (April 5, 1998), at 8.

[201] *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

communicate messages on a wide variety of topics and in a wide variety of formats,"[202] and they are entitled "under the First Amendment to exercise the widest journalistic freedom."[203] The archaic newspaper/broadcast cross-ownership ban directly and materially restricts that freedom by banning newspaper owners from providing messages of their choice, in a medium of their choice, to television and radio audiences in their home communities. The rule also restricts the First Amendment rights of broadcast licensees by precluding them from providing messages in print media through the vehicle of an in-market daily newspaper.[204]

Because the "spectrum scarcity" rationale no longer is viable, the restrictions imposed by the newspaper/broadcast cross-ownership ban must be justified under the same constitutional standards that apply to all other governmental regulations of protected speech. In this case, the regulation at issue singles out newspaper owners for especially onerous restrictions and suppresses their broadcast speech in favor of the speech of non-newspaper licensees. The newspaper/broadcast cross-ownership rule therefore should be reexamined under the standard of strict scrutiny,[205] which would require the Commission to show that its sweeping ownership prohibition is the "least restrictive means available of achieving a compelling state interest."[206] The Commission's wholesale cross-ownership ban clearly could not withstand challenge under

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[202] *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 636 (1994).

[203] *CBS Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quotation omitted).

[204] *Cf. Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.")

[205] *See Minneapolis Star & Tribune v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 583 (1983) (concluding that a regulation that singles out the press imposes a "heavier burden of justification on the State"); *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[G]overnment may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others.")

[206] *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

this most rigorous level of scrutiny, because, among other reasons, "it is impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one."[207] Of course, "it is the rare case in which . . . a law survives strict scrutiny."[208] As one prominent authority noted, when this "form of heightened scrutiny is applied, the law may properly be regarded as presumptively invalid, and likely to be struck down."[209]

Even if reviewed under the less rigorous standard of intermediate scrutiny (which the Commission has already suggested should apply),[210] the newspaper/broadcast cross-ownership ban still would not pass constitutional muster. Pursuant to this intermediate scrutiny standard, the Commission must show that the rule satisfies at least three requirements. First, the Commission must "demonstrate that the recited harms" -- *i.e.*, the harms to diversity posed by common ownership of newspapers and broadcast outlets -- are "real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[211] Second, because "constitutional authority to impose some limit is not authority to impose any limit imaginable,"[212] the Commission must "show a record that validates the regulation" itself and not just the agency's "abstract statutory authority to regulate."[213] Third, the FCC must show that newspaper/broadcast cross-ownership rule is "narrowly tailored to further a substantial

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[207] *Lutheran Church*, 141 F.3d at 355.

[208] *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

[209] 1 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech* § 4:3 (1999).

[210] *1998 Biennial Regulatory Review*, 15 FCC Rcd at 11121 (acknowledging that the subject rule would be sustained against claims that it violates the First Amendment if it satisfies the intermediate scrutiny standard announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[211] *Turner*, 512 U.S. at 664.

[212] *Time Warner*, 240 F.3d at 1129-30.

[213] *Id.* at 1130, 1137.

governmental interest."[214] To satisfy the element of "narrow tailoring," the agency must show that its complete ban on common ownership of co-located daily newspapers and broadcast stations "does not burden substantially more speech than necessary to further" its professed interests in increasing diversity.[215]

The Commission's archaic newspaper/broadcast cross-ownership rule fails the foregoing requirements of intermediate scrutiny. First, the Commission has not established, as it must, that the recited risks to diversity created by common ownership of newspapers and broadcast stations are real, and not merely conjectural. To the contrary, as discussed above in Section II, the Supreme Court has noted that when the Commission adopted the cross-ownership rule, it "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'speak with one voice,' or are harmful to competition."[216] Indeed, the Commission made affirmative empirical findings that, in general, there was significant diversity or "separate operation" between commonly owned broadcast stations and newspapers, and that newspaper affiliates tended to be superior licensees in terms of delivering locally-oriented service.[217] Without concrete evidence that common ownership of newspapers and broadcast facilities reduces diversity, the Commission's "broad prophylactic rule" is inherently "suspect."[218]

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[214] *League of Women Voters*, 468 U.S. at 380; *Time Warner Enm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (striking down limits on national cable ownership and carriage of vertically integrated programming); *C&P v. United States*, 42 F.3d 181 (4th Cir. 1984) (striking down cable/telco cross-ownership ban).

[215] *Turner*, 520 U.S. at 189.

[216] *NCCB*, 436 U.S. at 786. The Court of Appeals similarly observed that the administrative record "contained little 'hard' information" and no evidence of specific anti-competitive acts by cross-owned stations. *NCCB*, 555 F.2d at 956, 959.

[217] *Second Report and Order*, 50 FCC 2d at 1050, 1079, 1089.

[218] *Edenfield v. Fane*, 507 U.S. 761, 777 (1993).

Second, the Commission has not made any *factual* showing that its sweeping ban of newspaper/broadcast station ownership combinations would directly advance its goal of increasing diversity in the mass media marketplace. Indeed, the Commission premised its new rule on the admittedly conjectural proposition that prohibiting common ownership of newspapers and broadcast outlets "would *possibly* result in enhanced diversity of viewpoints . . . "[219] Nor did the Commission even attempt to show that its ownership rule would make a material impact on media diversity. The Commission characterized the object of its ownership ban as only "a mere hoped for gain in diversity."[220] It implicitly acknowledged that its policy may have only a modest effect, but concluded that "even a small gain in diversity" was "worth pursuing."[221]

Third, the Commission did not, and plainly could not, show that its wholesale ban on newspaper/broadcast combinations was "narrowly tailored" so as to burden no more speech than is necessary to further its diversity aims. As discussed above in Section III.C., the existing daily newspaper/broadcast cross-ownership rule is a blunt instrument -- a complete and categorical ban on all newspaper-broadcast combinations -- that fails to account for significant variations in the size, concentration, and other unique characteristics of individual media markets. For all these reasons, the daily newspaper/broadcast cross-ownership rule cannot survive First Amendment scrutiny and must be repealed.

C. Equal Protection Considerations Also Mandate That the Newspaper/Broadcast Cross-Ownership Ban Be Abolished.

The Equal Protection Clause of the United States Constitution, no less than the First Amendment, mandates elimination of the newspaper/broadcast cross-ownership ban. Regulatory

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[219] *NCCB*, 436 U.S. at 786 (emphasis added).

[220] *Second Report and Order*, 50 FCC2d at 1078.

[221] *NCCB*, 436 U.S. at 786.

classifications that, like the rule in question, interfere with the exercise of fundamental rights are judged under a rigorous standard of constitutional scrutiny. Specifically, "[t]he Equal Protection clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."[222] Even when they do not effect the exercise of First Amendment rights, all regulatory classifications that differentiate between similarly-situated groups or individuals must be "rationally related to a legitimate state interest."[223] The Commission's newspaper/broadcast cross-ownership ban cannot survive under either equal protection standard, because there is no overriding purpose, or even a rational basis, for restricting broadcasters from owning newspapers in their home communities when other media owners are not similarly restricted.[224] Moreover, as explained above, the Commission cannot show that its selective ban on common ownership of newspapers and broadcast stations is narrowly tailored because, among other reasons, the agency cannot show that this restriction directly and materially advances its stated interest in fostering diversity.

The Supreme Court has not hesitated to strike down on equal protection grounds ordinances and laws that discriminate between similarly-situated speakers. For example, in *Mosley*, the Court invalidated a statute that prohibited pickets and demonstrations within 150 feet of local schools, but that also exempted "peaceful picketing" related to a labor dispute within the school.[225] The Court found that the classification regarding permissible picketing was a violation

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[222] *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

[223] *Pennel v. City of San Jose*, 485 U.S. 1, 14 (1988).

[224] *Cf. Lutheran Church*, 141 F.3d at 355 ("it is impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one."); *Carey v. Brown*, 447 U.S. 455, 465 n.9 (1980) ("If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached.") (citations and internal quotation omitted).

[225] *Mosley*, 408 U.S. at 93-95.

of the equal protection guarantee in the absence of an overriding state interest to support a distinction between labor pickets and picketing by other speakers. The Court held that, where statutory classifications affect "expressive conduct within the protection of the First Amendment," it was inappropriate to review them under traditional rational basis standards.[226] Likewise, in *Carey v. Brown*, the Court struck down on equal protection grounds a ban on residential picketing that excepted peaceful picketing outside a home that was also used as a place of employment and was involved in a labor dispute.[227] The Court held that the ban's distinction between labor picketing and all other peaceful demonstrations was overly broad and not narrowly tailored to the government's stated purpose of protecting residential privacy because it made no attempt to distinguish among various sorts of non-labor picketing on the basis of the harms they would inflict on the privacy interest.[228] At the same time, the Court deemed the ordinance too under-inclusive to directly advance the government's privacy objectives because it permitted forms of picketing that were equally likely to intrude on the tranquility of the home.[229]

Similar constitutional infirmities pervade the Commission's existing newspaper/broadcast cross-ownership policy.[230] Television broadcasters at one time were the only providers of video programming. Today, however, they face competition from scores of new entrants in the video services marketplace who offer programming over coaxial and fiber

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[226] *Id.* at 98-99.

[227] 447 U.S. at 471.

[228] *Id.* at 565.

[229] *Id.* at 462.

[230] *Cf. Lutheran Church*, 141 F.3d at 355 (concluding "it is impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one").

optic cable, microwave frequencies, and spectrum allocated for DBS broadcasts. Nevertheless, television and radio broadcasters are alone singled-out by the Commission's rules as the only electronic media owners ineligible to own an in-market newspaper. Cable, DBS, other video service providers, and Internet content providers make comparable contributions to diversity and competition, but owners of these media may freely acquire in-market newspapers. In fact, although the Commission expressly recognized that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable [and] other video media",[231] the agency affirmatively decided against adopting a newspaper/cable cross-ownership restriction. Like the selective picketing ban in *Carey*, the cross-ownership rule in this proceeding is at once overly-broad -- because it bars all newspaper/broadcast combinations regardless of their impact on diversity in individual markets -- and hopelessly underinclusive because it spares all programming providers, except broadcasters, from its application.

These constitutional flaws were not nearly as apparent in 1978 when the Supreme Court affirmed the Commission's newspaper/broadcast cross-ownership in the face of an equal protection challenge. At that time, the Court concluded that the restriction "treat[s] newspaper owners in essentially the same fashion as other owners of the major media of mass communications . . . under the Commission's multiple-ownership rules."[232] Finding that owners of radio stations and television stations were similarly limited in their ability to acquire additional in-market broadcast outlets, the Court rejected the newspaper owners' equal protection challenge.

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[231] *Amendment of Section 73.3555, Report and Order*, 100 FCC 2d 17, 25 (1984). *See also Television Ownership Report and Order*, 14 FCC Rcd. at 12953 (concluding that cable systems, broadcast stations, and newspapers are all "important source[s] of news and information on issues of local concern" and compete with each other as news and advertising outlets).

[232] *NCCB*, 436 U.S. at 801.

Today, however, the Court could not possibly reach the same conclusion. As discussed above in Section V, ownership rules for other media combinations have loosened considerably since the *NCCB* case was decided, thereby undermining the foundation of the Court's equal protection ruling. Because the *NCCB* Court's denial of equal protection claims for newspaper owners was premised on a regulatory regime that has radically changed, the Commission must recognize that the Equal Protection Clause requires the immediate repeal of the newspaper/broadcast cross-ownership rule.

VII. The Ban Cannot Be Retained, Regardless of Market Size.

There are numerous reasons why the cross-ownership rule should be completely repealed and why a modified rule discriminately applicable to smaller markets would not be appropriate or valid. The Commission's failure to document any harm to diversity or competition from newspaper broadcast combinations applies across all size markets. The Commission has not demonstrated any need for protection in large or small markets or any reason to apply the rule differently across markets of varying sizes.

First, the size of the market did not have any effect on the conclusions produced in the Lichter study measuring non-entertainment programming, as discussed above in Section II.[233] In comparing co-owned and non-co-owned markets, Dr. Lichter found that stations in the three smallest Media General converged markets still aired more non-entertainment programming than stations in the immediately higher-ranked DMA.[234]

Second, as is also evident from the material collected in Appendices 9 through 14, the smaller Media General co-owned markets, like their larger counterparts, have experienced a dramatic growth in media outlets over the last quarter century. Media General's stations in

[233] Lichter Statement, Table 1 attached as Appendix 5.

Florence, South Carolina; Columbus, Georgia; and Panama City, Florida, which are all ranked in DMAs below the top 100, face competition from an enormous number of other media outlets. They each compete for viewers with at least five other television stations in their markets and between three to 11 Class A television and low-power television stations per market. Their radio metro markets have between 19 and 24 radio stations each, with more low-power FM radio stations on the way. Subscription video is available in hundreds of channels over cable and DBS. They also face competition from scores of local print outlets as well as a rapidly growing number of Internet sites that provide local content and, in many cases, offer advertising. There is no evidence in the record to show that smaller markets have been untouched by the explosive growth in media outlets.

Third, the factual material concerning the rule that has been amassed over the last quarter century supports wholesale repeal of the ban and argues against retaining any form of prohibition on co-owned properties in smaller markets. The comprehensive study of concentration and advertising rates prepared by Economists Incorporated and submitted by NAA in the 1998 Biennial Regulatory Review drew on data from large and small markets throughout the country. As discussed above in Section III, the portion of the study that evaluated concentration levels ensured that all market sizes were represented by using data from 21 DMAs that ranked in size from DMA #3 to DMA #206. Starting with the first 10 DMAs and proceeding through DMA #211, the study broke the DMAs into groups of 10 and then selected one market from each group of 10. The study next took all 21 DMAs and measured media concentration levels within them.

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[234] *Id.*

It found that in 20 out of the 21 DMAs, concentration had decreased or remained unchanged between 1975 and 1997. Market size made no difference in the findings.[235]

As also discussed in Section III, the same study surveyed advertising rates from over 1,400 daily newspapers around the country. The study produced no indication that commonly owned newspapers charge higher advertising prices than other newspapers. The large number of newspapers included in the study guaranteed that all market sizes were represented in the data that led to this conclusion.[236]

Fourth, small market media operators and consumers are also just as entitled as their counterparts in larger markets to the competitive benefits and synergies of convergence. If anything, the current Chairman and Commissioners have begun to conclude, appropriately, that the FCC may need to pay particular attention to stations in smaller markets and the difficult economic challenges they are facing. Earlier this year, Chairman Powell announced his support for further deregulation and for permitting common ownership of two television stations in small markets, stating, "[d]uopoly is probably more powerful in small markets where we have stations that can't survive."[237] More recently, in the context of reviewing problems with the DTV transition, Commissioner Copps acknowledged that "certain markets -- particularly stations in smaller television markets -- are facing costs that make it difficult, if not impossible, for them to meet the May deadline."[238] In words that apply equally to small and large market operators, the Chairman has also recognized the need to reconsider DTV transition obligations given the "new

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[235] *See generally* Economists Inc. Analysis at 1-2.

[236] *Id.*

[237] Bill McConnell, *Powell Likes Duop*, Broadcasting & Cable, May 14, 2001, at 10.

[238] *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Memorandum Opinion and Order on Reconsideration*, MM Docket No. 00-39, Separate Statement of Commissioner Michael J. Copps, at 1 (Nov. 15, 2001).

realities that have arisen out of the tragic events of September 11," including the financial effect of the attacks on media companies and the impact on consumer spending.[239] Diminishing network compensation has put further financial pressure on local owners to seek non-traditional outlets and sources of income.[240]

Fifth, local media -- again, particularly those in small markets -- face increasing competition from national players who, given the development of technologies over the last quarter century, can now send or beam their content and advertisements into every market in the nation. These national players may siphon off local advertising dollars from the communities receiving their programming, but they otherwise generally have no local presence or commitment. They prosper by creating large numbers of specialized video channels or websites, each of which serves a small, dispersed national audience, but collectively accumulates many viewers and users. At the same time, the local newspaper, and frequently the local broadcaster, each of whom are dedicated to covering local developments, is facing increasing costs of local news operations and increasingly distracted audiences. To survive in this environment, local news providers must be allowed to move beyond traditional structural ownership regulations and the confines of traditional media boundaries to address audiences the way they want to be addressed -- with multiple channels and streams of useful information when, where, and how the audiences want it.

Finally, good local journalism is extremely expensive to produce. Parties providing specialized national programming do not have the resources, incentive, or knowledge to develop

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[239] Heather F. Weaver, *Hollings Scans DTV Relocation Plan*, RCR Wireless News, Oct. 22, 2001 at 3.

[240] *See* Steve McClellan, *Small Towns, Big Problems; Financial Problems for Small Market Television Stations*, Broadcast & Cable, Aug. 6, 2001, at 20; Diane Mermigas, *Bigger Than Texas; Belo's Challenge: Thrive in World of Media Giants*, Electronic Media, Sept. 4, 2000, at 1.

local offerings. When confronted with a choice between making an investment in local news for a small community or an equivalently sized investment in yet another specialized provider of national content, financial firms will select the latter. Only the players who are already invested in local news will feel an incentive to use new media sources to bring consumers quality local journalism.

With repeal, newspapers and broadcasters could begin to take advantage effectively of the numerous benefits, cost savings and synergies of cross-ownership, all of which are discussed by Professor Gentry as "full convergence" and which are noted in his statement and in Section I above. Publishers and broadcasters, in turn, then should be better positioned to continue providing quality local news to their communities, and they could pass any cost savings on to consumers and advertisers in the form of enhanced, more immediate content and improved service. And, as further discussed by Professor Gentry, the communities served by these practitioners of full convergence also would benefit demonstrably from faster access to more local news reports and more extensive and deeper local news coverage.

It is fortuitous that, at this critical time when local television stations and newspapers in markets of all sizes across the nation are facing decreasing, fragmented audiences, diminished circulation and heightened financial pressures, the Commission has taken this opportunity to examine this anachronistic ownership restriction. It additionally is fortuitous that the benefits of full convergence recently have become particularly evident and accordingly provide at least a partial solution to the problems besetting local media in small and large markets.

Media General believes that the Commission should seize this historic opportunity to eliminate entirely its newspaper/broadcast cross-ownership ban and thereby act to foster localism and the evident benefits of full convergence, which serves local communities, promotes in-

market competition, and enhances the ability of local media to compete against their national rivals.

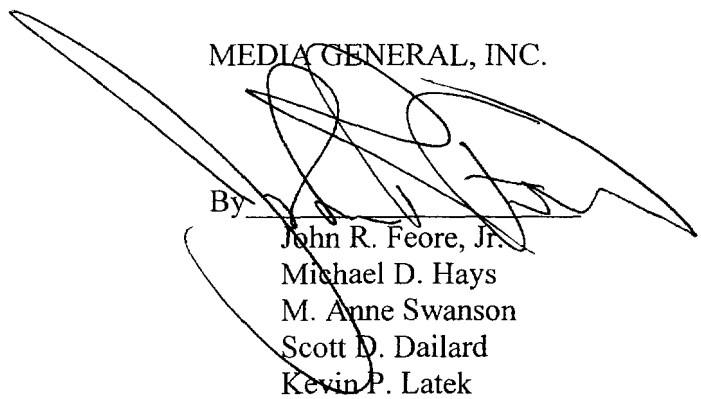
In light of the dearth of documented harms balanced against these likely benefits, any decision by the FCC other than one in favor of wholesale repeal of the rule would be unsustainable on appeal. Past regulation in this area has been fueled principally by conjecture. In light of the adoption of Section 202(h) of the 1996 Telecommunications Act, only a demonstrated harm to competition will sustain a continued ban. Lacking that, the Commission must move promptly to eliminate the rule in all markets, large and small.

VIII. Conclusion.

Media General submits that no legal or factual justifications remain for retaining the newspaper/broadcast cross-ownership ban. Indeed, numerous reasons, as set forth above, compel its immediate repeal in all markets, large or small. Accordingly, the Commission should eliminate Section 73.3555(d) of its rules.

Respectfully submitted,

MEDIA GENERAL, INC.



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